

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHNNY AGUILAR,

No. 4:15-CV-05020-JTR

Plaintiff,

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 15, 16. Attorney David M. Church represents Johnny Aguilar (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

On June 9, 2010, Plaintiff's mother protectively filed an application for Supplemental Security Income (SSI) on behalf of Plaintiff, a minor. Tr. 162-68. The application alleged that Plaintiff was disabled beginning July 15, 2002. Tr.

1 162. The application was denied initially and upon reconsideration. Tr. 91-93,
2 97-99. Administrative Law Judge (ALJ) Moira Ausems held a hearing on April
3 10, 2013, at which Plaintiff, who was not represented by counsel, testified, as did
4 his mother Tammy Castaneda, psychological expert Larry M. Kravitz, Ph.D., and
5 vocational expert (VE) Trevor Duncan. Tr. 38-88. On March 1, 2013, the ALJ
6 postponed the hearing to allow Plaintiff to obtain representation. Tr. 13, 40-41.
7 The ALJ issued an unfavorable decision on July 11, 2013. Tr. 13-34. The Appeals
8 Council denied review. Tr. 1-3. The ALJ's July 2013 decision became the final
9 decision of the Commissioner, which is appealable to the district court pursuant to
10 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on February 26,
11 2015. ECF Nos. 1, 4.

12 STATEMENT OF FACTS

13 The facts of the case are set forth in the administrative hearing transcript, the
14 ALJ's decision, and the briefs of the parties. They are only briefly summarized
15 here.

16 Plaintiff was 18 years old at the time of the hearing. Tr. 162. Plaintiff
17 attended school through twelfth grade taking mostly special education classes, but
18 he was "disenrolled" before he could graduate. Tr. 57-58. Plaintiff testified that
19 he recently did security work for a friend; his duties were to "sit at the front door,
20 look tough[,] and pat people down to make sure there [were] no fights." Tr. 63-64.
21 Plaintiff had only done this work on one occasion, but hoped to do it more. Tr. 65.

22 Plaintiff testified that he has problems controlling his temper, which
23 sometimes causes him to "black out" or "go into a bipolar attack." Tr. 59.
24 Plaintiff also testified that he has migraine headaches, and for a time, had migraine
25 headaches every day. Tr. 74-75.

26 On a typical day, Plaintiff will wake up around 2:00 p.m. and watch
27 television and play video games. Tr. 63. Plaintiff lives with his mother and they
28 split the household chores. Tr. 65. Plaintiff is usually responsible for doing the

1 dishes, taking out the garbage, and cleaning the house. Tr. 65.

2 **STANDARD OF REVIEW**

3 The ALJ is responsible for determining credibility, resolving conflicts in
 4 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
 5 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
 6 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
 7 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
 8 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
 9 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
 10 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
 11 another way, substantial evidence is such relevant evidence as a reasonable mind
 12 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
 13 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
 14 interpretation, the court may not substitute its judgment for that of the ALJ.
 15 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
 16 evidence will still be set aside if the proper legal standards were not applied in
 17 weighing the evidence and making the decision. *Brawner v. Secretary of Health*
 18 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
 19 supports the administrative findings, or if conflicting evidence supports a finding
 20 of either disability or non-disability, the ALJ's determination is conclusive.
 21 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

22 **SEQUENTIAL EVALUATION PROCESS**

23 **A. Childhood sequential evaluation process**

24 To qualify for disability benefits, a child under the age of eighteen must
 25 have "a medically determinable physical or mental impairment, which results in
 26 marked and severe functional limitations, and which can be expected to result in
 27 death or which has lasted or can be expected to last for a continuous period of not
 28 less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(I).

1 The Social Security Administration has enacted a three-step sequential
 2 analysis to determine whether a child is eligible for SSI benefits. 20 C.F.R. §
 3 416.924(a). First, the ALJ considers whether the child is engaged in “substantial
 4 gainful activity.” *Id.* at § 416.924(b). Second, the ALJ considers whether the child
 5 has a “medically determinable impairment that is severe,” which is defined as an
 6 impairment that causes “more than minimal functional limitations.” *Id.* at §
 7 416.924(c). Finally, if the ALJ finds a severe impairment, the ALJ must consider
 8 whether the impairment “medically equals” or “functionally equals” a disability
 9 listed in the regulatory “Listing of Impairments.” *Id.* at § 416.924(c)-(d).

10 An impairment “functionally equals” a listed impairment if it results in
 11 marked limitations in at least two of six functional domains or an extreme
 12 limitation in at least one domain. 20 C.F.R. § 416.926a(a). The six functional
 13 domains are (1) acquiring and using information; (2) attending and completing
 14 tasks; (3) interacting with and relating to others; (4) moving about and
 15 manipulating objects; (5) caring for oneself; and, (6) health and physical well-
 16 being. *Id.* at § 416.926a(b)(1)(i)-(vi); SSR 09-1p, available at 2009 WL 396031, at
 17 *1. A marked limitation “interferes seriously with [the child’s] ability to
 18 independently initiate, sustain, or complete activities.” *Id.* at § 416.926a(e)(2). An
 19 extreme limitation “interferes very seriously” with those abilities. *Id.* at §
 20 416.926a(e)(3). In assessing whether the claimant has “marked” or “extreme”
 21 limitations, the ALJ must consider the functional limitations from all medically
 22 determinable impairments, including any impairments that are not severe. *Id.* at §
 23 416.926a(a). The ALJ must also consider the interactive and cumulative effects of
 24 the claimant’s impairment or multiple impairments in any affected domain. *Id.* at §
 25 416.926a(c).

26 **B. Adult sequential evaluation process**

27 The Commissioner has established a five-step sequential evaluation process
 28 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*

1 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
 2 proof rests upon claimants to establish a *prima facie* case of entitlement to
 3 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once
 4 claimants establish that physical or mental impairments prevent them from
 5 engaging in their previous occupations. 20 C.F.R. § 416.920(a)(4). If claimants
 6 cannot do their past relevant work, the ALJ proceeds to step five, and the burden
 7 shifts to the Commissioner to show that (1) the claimants can make an adjustment
 8 to other work, and (2) specific jobs exist in the national economy which claimants
 9 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194
 10 (2004). If claimants cannot make an adjustment to other work in the national
 11 economy, a finding of “disabled” is made. 20 C.F.R. § 416.920(a)(4)(i-v).

12 **ADMINISTRATIVE DECISION**

13 On July 11, 2013, the ALJ issued a decision finding Plaintiff was not
 14 disabled as defined in the Social Security Act.

15 The ALJ’s first analyzed whether Plaintiff was disabled prior to age 18.

16 First, the ALJ found that Plaintiff had not engaged in substantial gainful
 17 activity since the application date. Tr. 18.

18 Second, the ALJ found that Plaintiff had the following severe impairments:
 19 attention deficit hyperactivity disorder (ADHD); major depressive disorder;
 20 hypertension; migraines; and obesity. Tr. 18.

21 Third, the ALJ found that Plaintiff did not have an impairment or
 22 combination of impairments that met or medically equaled one of the Listings. Tr.
 23 18. The ALJ further found that Plaintiff did not have an impairment or
 24 combination of impairments that functionally equaled the Listings. Tr. 19. The
 25 ALJ concluded that Plaintiff was not disabled prior to attaining age 18. Tr. 30.

26 As Plaintiff turned eighteen prior to the time of the hearing, the ALJ further
 27 analyzed whether Plaintiff was disabled after attaining age 18.

28 The ALJ found that Plaintiff had not developed any new impairments since

1 attaining age 18. Tr. 30.

2 The ALJ found that, since attaining age 18, Plaintiff continued to have a
 3 severe impairment or combination of impairments, but did not meet the Listings.
 4 Tr. 30.

5 The ALJ assessed Plaintiff's residual function capacity (RFC) and
 6 determined he could perform a full range of work at all exertional levels but with
 7 following nonexertional limitations: "[Plaintiff] is able to understand, remember,
 8 and carry out simple and routine tasks. [Plaintiff] can have brief superficial
 9 contact with the public and cooperative teamwork with coworkers." Tr. 32. The
 10 ALJ found Plaintiff had no past relevant work. Tr. 32.

11 The ALJ determined that, considering Plaintiff's age, education, work
 12 experience and RFC, and based on the testimony of the VE, there were other jobs
 13 that exist in significant numbers in the national economy Plaintiff could perform,
 14 including the jobs of production assembler, hand packager, and laundry worker.
 15 Tr. 32-33. The ALJ thus concluded Plaintiff was not under a disability within the
 16 meaning of the Social Security Act at any time from January 22, 2013, the date
 17 Plaintiff attained age 18, through the date of the ALJ's decision. Tr. 33.

18 ISSUES

19 The question presented is whether substantial evidence supports the ALJ's
 20 decision denying benefits, and, if so, whether that decision is based on proper legal
 21 standards. Plaintiff contends the ALJ erred by (1) failing to conduct an adequate
 22 childhood step three analysis; (2) failing to conduct an adequate adult step five
 23 analysis; (3) failing to adequately develop the record; (4) failing to properly
 24 consider Plaintiff's testimony about the severity of his symptoms; and (5)
 25 improperly rejecting the testimony of Plaintiff's mother.

26 DISCUSSION

27 A. Credibility

28 Plaintiff contests the ALJ's adverse credibility determination. ECF No. 15

1 at 17-18.

2 It is generally the province of the ALJ to make credibility determinations,
 3 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
 4 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
 5 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
 6 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
 7 1273, 1281 (9th Cir. 1996). "General findings are insufficient: rather the ALJ
 8 must identify what testimony is not credible and what evidence undermines the
 9 claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

10 The ALJ found Plaintiff's reporting of the intensity, persistence, and limiting
 11 effects of his symptoms not fully credible. Tr. 21, 32. The ALJ reasoned that
 12 Plaintiff was less than credible because (1) objective evidence did not support
 13 Plaintiff's testimony of having daily migraines, (2) Plaintiff did not take prescribed
 14 medication for ADHD or hypertension, was not prescribed medication for his
 15 depression, and did not seek a refill of his migraine medications, (3) Plaintiff had
 16 not sought treatment since January 2013, (4) Plaintiff's academic problems
 17 stemmed from poor attendance, rather than cognitive or social dysfunction, and (5)
 18 Plaintiff's reports, and the reports of Plaintiff's mother's, regarding Plaintiff's
 19 behavioral issues were inconsistent with reports contained in Plaintiff's school and
 20 medical records. Tr. 21-22, 32.

21 **1. Neck pain and daily migraines not supported by medical evidence**

22 The ALJ noted that objective medical evidence, including x-rays, did not
 23 support Plaintiff's reports of neck pain and daily migraines. Tr. 22-23 (citing Tr.
 24 301). The ALJ further noted that treatment records indicated that Plaintiff had
 25 only occasional headaches and his headaches were related to medication
 26 noncompliance. Tr. 23 (citing Tr. 297-302, 319-22, 349-90, 391-95).

27 Although it cannot serve as the sole ground for rejecting a claimant's
 28 credibility, objective medical evidence is a "relevant factor in determining the

1 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261
 2 F.3d 853, 857 (9th Cir. 2001).

3 The ALJ's finding that Plaintiff's neck pain and daily migraine headaches
 4 are not supported by objective evidence is a specific, clear, and convincing reason
 5 to discredit Plaintiff. Plaintiff does not appear to contest that his neck pain is not a
 6 severe impairment. As noted by the ALJ, Plaintiff inconsistently reported his neck
 7 pain, and objective evidence does not establish the presence of any abnormality
 8 that would cause such pain. Furthermore, substantial evidence supports the ALJ's
 9 finding the record indicates that Plaintiff only occasionally reported migraine
 10 headaches and the headaches decreased with medication compliance. *See, e.g.*,
 11 370 (Dr. Hernandez noting that Plaintiff's blood pressure had gone down with use
 12 of atenolol and that Plaintiff "report[ed] that headache frequency and severity are
 13 less and much improved."); Tr. 377 (Dr. Hernandez noting connection between
 14 hypertension and headaches). The ALJ did not err in finding Plaintiff's neck pain
 15 and daily migraines unsupported by the objective evidence and inconsistent with
 16 Plaintiff's symptom reporting.

17 **2. Failure to take prescription medication**

18 The ALJ noted that Plaintiff had been diagnosed with ADHD, but had not
 19 taken medication since approximately 2007. Tr. 21 (citing Tr. 304). The ALJ also
 20 noted that Plaintiff had been prescribed medication for migraines and hypertension,
 21 but he no longer took those medications. Tr. 32 (citing Tr. 392).

22 The fact that a condition can be remedied by medication is a legitimate
 23 reason for discrediting an opinion. *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d
 24 1001, 1006 (9th Cir. 2006). Furthermore, noncompliance with medical care can
 25 cast doubt on a claimant's subjective complaints. 20 C.F.R. § 416.930; *Fair v.*
 26 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

27 The fact that Plaintiff did not consistently take his medications as prescribed
 28 is a specific, clear, and convincing for discrediting Plaintiff. The ALJ cited

1 substantial evidence supporting this finding, which is consistent with other
2 evidence in the record. *See* Tr. 46-47 (Plaintiff's mother testifying that Plaintiff
3 last used psychotropic medications in seventh grade); Tr. 71 (Plaintiff's mother
4 testifying that Plaintiff took Atenolol for hypertension, but stopped taking it); Tr.
5 75 (Plaintiff testifying that he took prescription medication for migraines but he
6 stopped taking it because he did not have a primary care physician after Dr.
7 Tatanay); Tr. 322 (Dr. Tatanay noting Plaintiff "is not actually taking his [blood
8 pressure] medications . . . on a regular basis"); Tr. 374 (Dr. Hernandez noting
9 Plaintiff had not been taking his hypertension medication as prescribed). The ALJ
10 did not err in discrediting Plaintiff based on Plaintiff's noncompliance with his
11 medication.

12 **3. Failure to seek treatment**

13 The ALJ noted that Plaintiff had not sought treatment since January 2013
14 when he turned eighteen, at which time his pediatric provider required him to find
15 a new primary care provider. Tr. 32.

16 Unexplained or inadequately explained reasons for failing to seek medical
17 treatment cast doubt on a claimant's subjective complaints. 20 C.F.R. § 416.930;
18 *Fair*, 885 F.2d at 603.

19 The fact that Plaintiff had not sought medical treatment for approximately
20 three months prior to the ALJ's decision is not a clear and convincing reason to
21 discredit Plaintiff. The record indicates that Plaintiff sought fairly regular medical
22 treatment from at least 2010 to 2013. Tr. 300-02, 321-22, 349-95. Furthermore,
23 Plaintiff's failure to seek treatment can at least partially be explained by the fact
24 that his primary care physician, Dr. Tatanay, did not treat adults and required
25 Plaintiff to seek another doctor after he turned eighteen years old. *See* Tr. 391
26 (January 2013 treatment note in which Dr. Tatanay advises Plaintiff of the need for
27 him to look for a primary care provider for prescription refills and medication
28 management). Any error, however, is harmless given the ALJ's other valid

1 reasons for discrediting Plaintiff. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038
 2 (9th Cir. 2008) (an error is harmless when “it is clear from the record that the . . .
 3 error was inconsequential to the ultimate nondisability determination”).

4 **4. Poor school attendance and lack of effort as reasons for academic
 5 problems**

6 The ALJ noted that Plaintiff’s teachers did not find Plaintiff to have
 7 significant deficits in social functioning. Tr. 21. The ALJ noted that a significant
 8 part of Plaintiff’s academic issues were caused by poor school attendance. Tr. 21
 9 (citing Tr. 50 (Dr. Kravitz testifying that school attendance problems contributed to
 10 Plaintiff’s poor academic performance); Tr. 227 (“[school] attendance has been
 11 dismal this year”); Tr. 294 (Plaintiff given detention for being tardy); Tr. 235
 12 (“School attendance has stymied progress in all academic areas”)). The ALJ noted
 13 that some of Plaintiff’s absences were excused for medical reasons, but many
 14 absences were not excused. Tr. 21-22 (citing Tr. 200, 206 (Mr. Anderson
 15 reporting Plaintiff absent seventy percent of the time and most absences were not
 16 excused)). The ALJ further noted that Plaintiff’s teacher reported that he chose not
 17 to put forth maximum effort. Tr. 22 (citing Tr. 296).

18 In determining a claimant’s credibility, the ALJ may consider “ordinary
 19 techniques of credibility evaluation, such as the claimant’s reputation for lying,
 20 prior inconsistent statements . . . and other testimony by the claimant that appears
 21 less than candid.” *Smolen*, 80 F.3d at 1284.

22 Substantial evidence supports the ALJ’s finding that Plaintiff is not as
 23 cognitively or behaviorally limited as he alleges based on the fact that his academic
 24 problems can be attributed to his unexcused school absences. As the ALJ notes
 25 elsewhere in her decision, “When a student is routinely absent, it takes extra time
 26 for the student to catch up to his peers and to complete missed assignments.” Tr.
 27 27. The ALJ reasonably inferred that Plaintiff’s allegations of cognitive
 28 impairments were not indicative of disability, but a result of poor attendance and

1 lack of effort. This is a specific, clear, and convincing reason to discredit Plaintiff.

2 **5. Inconsistent statements**

3 The ALJ noted inconsistencies about Plaintiff's ability to engage socially
4 and maintain appropriate behavior. Tr. 22. The ALJ cited Plaintiff's mother's
5 reports that Plaintiff engages in self-mutilation and sexual self-stimulation and also
6 cited a treatment note documenting an incident that ended with police holding
7 Plaintiff at gunpoint. Tr. 22 (citing Tr. 304, 322). The ALJ found the reports of
8 Plaintiff and Plaintiff's mother inconsistent with his teachers' reports that indicate
9 Plaintiff gets along well with peers and teachers. Tr. 22 (citing Tr. 227, 243, 245,
10 300, 305). The ALJ also noted that there was no evidence of self-mutilation and
11 that Plaintiff's examining sources found Plaintiff cooperative. Tr. 22, 307. The
12 ALJ noted that Plaintiff and Plaintiff's mother inconsistently reported details of his
13 police encounter and his altercation with his school's vice principal. Tr. 22.
14 Finally, the ALJ noted that Plaintiff's mother had earlier indicated that Plaintiff
15 had no social functioning limitations. Tr. 22 (citing Tr. 175).

16 In determining a claimant's credibility, the ALJ may consider "ordinary
17 techniques of credibility evaluation, such as the claimant's reputation for lying,
18 prior inconsistent statements . . . and other testimony by the claimant that appears
19 less than candid." *Smolen*, 80 F.3d at 1284.

20 The inconsistencies noted by the ALJ between Plaintiff's (and Plaintiff's
21 mother's) reporting of his behavioral and social problems and the reports of
22 Plaintiff's teachers and medical providers is a specific, clear, and convincing
23 reason to discredit Plaintiff. Substantial evidence supports that Plaintiff's behavior
24 in school is usually appropriate. *See, e.g.*, Tr. 227 (Plaintiff's teachers reporting
25 that Plaintiff's "behavior is fine. He does his work. He's very polite and doesn't
26 argue or show defiance. He just needs to come to school every day."). The ALJ
27 also properly cited other inconsistencies between Plaintiff's reporting and third
28 party reports. *Smolen*, 80 F.3d at 1284. The ALJ did not err in using these

1 inconsistencies to discredit Plaintiff.

2 **6. Conclusion**

3 In conclusion, the ALJ provided specific, clear, and convincing reasons for
4 finding Plaintiff less than credible. The ALJ's adverse credibility determination is
5 supported by substantial evidence and any error is harmless.

6 **B. Childhood step three analysis**

7 Plaintiff argues that the ALJ erred by not finding him markedly limited in at
8 least two functional domains at step three of the childhood disability analysis.
9 ECF No. 15 at 9-13. Plaintiff argues that substantial evidence supports that he is
10 markedly limited in his ability to care for himself, attend and complete tasks, and
11 health and physical well-being, and, therefore, his impairments functionally equal
12 the childhood listings. *Id.*

13 At step three of the childhood sequential process, an impairment causes a
14 “marked limitation” if it “seriously interferes with [a person’s] ability to
15 independently initiate, sustain, or complete activities.” 20 C.F.R. §
16 416.926a(e)(2)(I). In assessing severity, the Commissioner must consider not only
17 the claimant’s medically determinable impairments, but also such factors as the
18 child’s age, the effects of any chronic illness, the impact of any medication the
19 child is taking, the effects of structured or highly supported settings, adaptions,
20 time spent in therapy, school attendance, and pain and other symptomatology. *Id.*
21 at §§ 416.924a–416.924c, 416.928–416.929.

22 **1. Caring for oneself**

23 In the domain of caring for oneself, the Commissioner considers “how well
24 [claimants] maintain a healthy emotional and physical state, including how well
25 [they] get [their] physical and emotional wants and needs met in appropriate ways;
26 how [claimants] cope with stress and changes in [their] environment; and whether
27 [claimants] take care of [their] own health, possessions, and living area.” 20
28 C.F.R. § 416.926a(k).

1 The ALJ found that Plaintiff had less than marked limitation in his ability to
2 care for himself. Tr. 29. The ALJ noted that Plaintiff ate large quantities of fast
3 food. Tr. 29 (citing Tr. 304). The ALJ cited the April 2011 opinion of Mr.
4 Anderson, Plaintiff's teacher, that Plaintiff had no problem caring for himself. Tr.
5 29 (citing Tr. 205). The ALJ noted that Plaintiff's mother reported that Plaintiff
6 was able to perform household chores and take care of personal hygiene. Tr. 29
7 (citing Tr. 176).

8 Plaintiff argues that the ALJ erred by rejecting the opinion of Beth Fitterer,
9 Ph.D., and Debra Iannuzzi, M.D., that Plaintiff was markedly limited in his ability
10 to care for himself. ECF No. 15 (citing Tr. 346). Plaintiff argues that “[t]he only
11 reason the ALJ gave for rejecting this opinion was that ‘Dr. Kravitz [the ME at the
12 hearing], said the marked limitation represents a misreading of the description of
13 the domain.’” *Id.* (citing Tr. 23).

14 The Court finds substantial evidence supports the ALJ's finding that
15 Plaintiff is less than markedly limited in his ability to care for himself. Contrary to
16 Plaintiff's argument, the ALJ did not simply rely on the opinions of the medical
17 expert to discount the marked limitation assessed by Drs. Fitterer and Iannuzzi.
18 Rather, the ALJ cited to several pieces of evidence indicating that Plaintiff is
19 mostly able to take care of himself, including the reports of Plaintiff's teacher and
20 mother. Tr. 29. The ALJ's finding is consistent with other evidence in the record.
21 *See, e.g.*, Tr. 304 (Plaintiff reporting to Dr. Cooper that he “tends to his hygiene
22 and grooming without assistance”). Even if the ALJ somehow erred in evaluating
23 the criteria of this domain, any error is harmless because, as discussed *infra*, the
24 ALJ did not err in finding Plaintiff less than markedly limited in any other
25 functional domains. For a claimant to demonstrate functional equivalency, the
26 claimant must be markedly limited in at least two domains. 20 C.F.R. §
27 416.924a(a). Thus, even if the ALJ had concluded that Plaintiff was markedly
28 limited in his ability to care for himself, such finding would be inconsequential to

1 the ultimate nondisability determination.¹ The ALJ did not err in finding Plaintiff
 2 less than markedly limited in his ability to care for himself.

3 **2. Attending and completing tasks**

4 In the domain of attending and completing tasks, the Commissioner
 5 considers “how well [claimants] are able to focus and maintain [their] attention,
 6 and how well [they] begin, carry through, and finish [their] activities, including the
 7 pace at which [they] perform activities and the ease with which [they] change
 8 them.” 20 C.F.R. § 416.926a(h).

9 The ALJ found that Plaintiff had less than marked limitation in attending
 10 and completing tasks. Tr. 26. The ALJ cited to a November 2008 Individualized
 11 Education Program report (IEP) completed by Plaintiff’s teacher where the teacher
 12 noted Plaintiff capable of working in quiet areas and that Plaintiff had some
 13 difficulty paying attention. Tr. 26 (citing Tr. 291). The ALJ cited to Dr. Cooper’s
 14 report, which noted Plaintiff’s teachers’ observations that Plaintiff’s attention was
 15 improving. Tr. 26 (citing Tr. 243); *see also* Tr. 291. The ALJ cited to a November
 16 2009 IEP indicating that Plaintiff was having trouble paying attention and needed
 17 to work at a slower pace. Tr. 26 (citing Tr. 246). The ALJ cited to Mr. Anderson’s
 18 opinion that Plaintiff had no to slight problems in this domain (except Plaintiff had
 19 obvious problem paying attention when spoken to directly). Tr. 26 (citing Tr.
 20 202). The ALJ found some of Plaintiff’s problem attending and completing tasks
 21 stemmed from his ADHD, but also due to “attendance issues and lack of effort.”
 22 Tr. 26-27 (citing Tr. 223, 227, 294, 296).

23

24 ¹Plaintiff does not argue, and no evidence in the record supports, that
 25 Plaintiff had an “extreme” limitation in his ability to take care of himself. *Cf.* 20
 26 C.F.R. § 416.924a(a) (the existence of one extreme limitation in a childhood
 27 disability domain is enough to prove that a claimant’s impairments are functionally
 28 equivalent to the listings).

1 Plaintiff argues that the ALJ failed to give adequate reasons for rejecting the
2 opinions of Plaintiff's teachers that he had difficulty paying attention and needed
3 special accommodations. Specifically, Plaintiff argues that "[t]he ALJ did not
4 explain why absences would make it necessary for [Plaintiff] to 'work in a quiet
5 area where he cannot be distracted by friends' or why he would need special
6 instructions when he was present." ECF No. 15 at 12 (citing Tr. 27, 232, 246).

7 The Court concludes that substantial evidence supports the ALJ's finding
8 that Plaintiff is less than markedly limited in his ability to attend and complete
9 tasks. The Court agrees with Plaintiff that Plaintiff's poor attendance does not
10 explain some of the limitations noted by Plaintiff's teachers and cited by Plaintiff.
11 Nevertheless, the ALJ cited to other evidence supporting her decision, including
12 Mr. Anderson's assessment, Tr. 202, and Plaintiff's teacher's opinion that
13 Plaintiff's attention was improving, Tr. 291. Plaintiff also makes no effort to
14 refute the ALJ's finding that some of Plaintiff's problems were due to Plaintiff's
15 lack of effort. *See* Tr. 27, 296. Lack of effort is an additional reason (independent
16 of Plaintiff's poor attendance) provided by the ALJ to question whether Plaintiff's
17 difficulty concentrating and attending to tasks is a result of his impairments.
18 Furthermore, other evidence in the record supports the ALJ's finding. *See* Tr. 307
19 (Dr. Cooper stating "[Plaintiff] did not describe problems completing tasks"); 315
20 (Drs. Beaty and Wolfe opining that Plaintiff is less than markedly limited in
21 attending and completing tasks); 345 (Drs. Fitterer and Iannuzzi opining the same).
22 The ALJ did not err in finding Plaintiff less than markedly limited in his ability to
23 attend and complete tasks.

24 **3. Health and physical well-being**

25 In the domain of health and well-being, the Commissioner considers "the
26 cumulative physical effects of physical or mental impairments and their associated
27 treatments or therapies on [claimants'] functioning that [the Commissioner] did not
28 [otherwise consider]." 20 C.F.R. § 416.926a(l). A child has a "marked" health

1 and physical well-being limitation if [he or she] is frequently ill because of the
2 impairment(s) or has frequent exacerbations of impairment(s) that result in
3 "significant, documented symptoms or signs." *Id.* § 416.926a(e)(2)(iv).

4 The ALJ found Plaintiff was less than markedly limited in health and
5 physical well-being domain. Tr. 30. The ALJ reasoned that Plaintiff did not take
6 medication for his ADHD or depression. Tr. 30. The ALJ noted that Plaintiff was
7 obese and had uncontrolled hypertension because he did not consistently take
8 medication. Tr. 30.

9 Plaintiff argues that the ALJ erred by not discussing how Plaintiff's migraine
10 headaches affected his health and well-being. ECF No. 15 at 13. The Court agrees
11 that the ALJ likely erred by not discussing how Plaintiff's headaches affected his
12 health and well-being. Any error is harmless, however, because the ALJ
13 thoroughly discussed Plaintiff's migraine headaches elsewhere in the ALJ's
14 decision. As discussed *supra*, the ALJ did not err in finding that Plaintiff's
15 complaints of daily migraine headaches were not supported by objective medical
16 evidence. The ALJ also found that medication was helpful in reducing Plaintiff's
17 headaches, but Plaintiff failed to take his medication as prescribed. Furthermore,
18 in the health and well-being domain, the ALJ discussed Plaintiff's uncontrolled
19 hypertension. Both Dr. Hernandez and Dr. Tatumay commented that Plaintiff's
20 migraine headaches were connected to his blood pressure problems. Tr. 330 (Dr.
21 Tatumay explaining "headache may have been secondary to the blood pressure");
22 Tr. 377 (Dr. Hernandez noting connection between hypertension and headaches).
23 Substantial evidence supports the ALJ's finding that Plaintiff is less than markedly
24 limited in his health and well-being and any error made by the ALJ is harmless.

25 **4. Conclusion**

26 The Court concludes that the ALJ's childhood step three analysis is
27 supported by substantial evidence and any error is harmless.

28 ///

1 **C. Lay witness testimony**

2 Plaintiff argues that the ALJ improperly rejected the testimony of Plaintiff's
 3 mother, Tammy Castaneda. ECF No. 15 at 19-20.

4 Lay witness testimony cannot establish the existence of medically
 5 determinable impairments. *Cf.* 20 C.F.R. § 416.913(d)(a). But lay witness
 6 testimony is "competent evidence" as to "how an impairment affects [a claimant's]
 7 ability to work." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050 (9th Cir.
 8 2006); 20 C.F.R. § 416.913(d)(4); *see also Dodrill v. Shalala*, 12 F.3d 915, 918-19
 9 (9th Cir. 1993) ("[F]riends and family members in a position to observe a
 10 claimant's symptoms and daily activities are competent to testify as to her
 11 condition."); *Brown v. Callahan*, 120 F.3d 1133, 1135 (10th Cir. 1997) ("In
 12 disability cases where the child is unable to adequately describe her symptoms, the
 13 Commissioner accepts the testimony of a person most familiar with the child's
 14 condition, such as a parent.").

15 Ms. Castaneda testified at the hearing and completed a function report on
 16 behalf of Plaintiff. Tr. 66-78, 170-78. In the function report, Ms. Castaneda
 17 represented Plaintiff had difficulty getting to school on time, accepting criticism or
 18 correction, obeying rules, and asking for help when needed, Tr. 176; and Plaintiff
 19 did not finish things he started and did not complete homework on time Tr. 177.

20 At the hearing, Ms. Castaneda testified that she took Plaintiff off of his
 21 psychiatric medications because they made it too difficult for him to get up in the
 22 morning, Tr. 46; Plaintiff is able to work well under the supervision of an adult
 23 with whom Plaintiff has a "connection," Tr. 68; she needed to protect Plaintiff
 24 from things that make him upset or angry, Tr. 70-71; when Plaintiff gets really bad
 25 headaches, he needs to be in a cool, dark room, Tr. 76; and she took Plaintiff to a
 26 job fair, but he could not fill out the applications on his own, Tr. 84-85.

27 The ALJ discussed Ms. Castaneda's reports throughout the ALJ's opinion,
 28 but appeared to give those reports little weight. Tr. 20-21, 22, 28, 32. The ALJ

1 found Ms. Castaneda's reporting of Plaintiff's behavioral issues inconsistent with
2 the reports of Plaintiff's teachers. Tr. 22. The ALJ also reasoned that Ms.
3 Castaneda's hearing testimony was inconsistent with the function report she
4 completed on behalf of Plaintiff, in which she indicated that Plaintiff had no social
5 limitations. Tr. 22 (citing Tr. 175). The ALJ found less than credible Ms.
6 Castaneda's testimony regarding Plaintiff taking migraine medication sparingly.
7 Tr. 32. The ALJ reasoned that "[i]f [Plaintiff] is truly having migraines daily, as
8 he testified, it would be assumed he would seek treatment for this impairment and
9 would require a refill of this medication, which was last filled in January 2013."
10 Tr. 32.

11 The ALJ provided germane reasons for giving little weight to Ms.
12 Castaneda's testimony and reports. Inconsistency between Ms. Castaneda's
13 reporting of Plaintiff's behavioral issues and the reports of Plaintiff's teachers is a
14 germane reason to give Ms. Castaneda's reports less weight. Likewise, to the
15 extent that Ms. Castaneda testified that Plaintiff was socially limited, the ALJ
16 provided germane reasons for rejecting such limitation. *See* Tr. 22 (ALJ noting
17 Ms. Castaneda's testimony inconsistent with her reporting that Plaintiff had no
18 social limitations in her function report) (citing Tr. 175); Tr. 28 (ALJ noting that
19 Ms. Castaneda reported to Dr. Cooper that Plaintiff has several friends with whom
20 he enjoyed "hanging out") (citing Tr. 305). The Court finds the ALJ's statement
21 that "[t]he testimony of [Ms. Castaneda] regarding [Plaintiff] taking the migraine
22 medication sparingly is not entirely credible," Tr. 32, somewhat ambiguous. Ms.
23 Castaneda's testimony that Plaintiff used his migraine medication "sparingly," Tr.
24 78, seems consistent with her testimony that Dr. Tatumay prescribed Plaintiff a
25 small amount of pills at Plaintiff's final appointment with Dr. Tatumay and Plaintiff
26 has not sought to refill the prescription, Tr. 77-78. *See also* Tr. 391. Regardless of
27 this ambiguous reasoning, the ALJ's other reasons are germane to giving little
28 weight to Ms. Castaneda's testimony concerning Plaintiff's behavioral and social

1 limitations.

2 Plaintiff cites reports prepared by his teachers that are consistent with Ms.
 3 Castaneda's testimony. ECF No. 15 at 20 (citing Tr. 201-03, 296). Plaintiff's
 4 argument is a reasonable interpretation of the evidence, but the ALJ cites to
 5 substantial evidence in finding Plaintiff's behavior is not as limiting as alleged by
 6 Plaintiff and Ms. Castaneda. Tr. 22 (citing Tr. 227, 243, 245, 300, 305). If the
 7 evidence is susceptible to more than one rational interpretation, the Court may not
 8 substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097.

9 **D. Adult step five analysis**

10 Plaintiff argues that the ALJ erred by presenting the VE with an incomplete
 11 hypothetical question. ECF No. 15 at 14-15. Specifically, Plaintiff argues that the
 12 ALJ should have included limitations established by Plaintiff's IEPs and the
 13 testimony of Plaintiff and Plaintiff's mother, including Plaintiff's need for
 14 accommodations, more time to complete tasks, the need to have instructions
 15 repeated, and limitations caused by Plaintiff's migraine headaches. *Id.* at 14-15.

16 At the hearing, the ALJ asked the VE if a person could work if the person
 17 had the following limitations:

18
 19 [D]ue to a combination of headaches and learning disorders and . . .
 20 just coping with various emotional issues over the year which are
 21 more defined in the record . . . an individual who's limited to simple,
 22 routine tasks by virtue of reductions of concentration, persistence and
 23 pace from a number of variables just to that level of work.

24 And such work should not be performed in a setting where
 25 there's more than brief, superficial contact with the general public or
 26 any performance of cooperative teamwork endeavors with co-
 27 workers, again, just due to the level of distraction and the potential for
 28 . . . some degree of, perhaps, annoyance or emotional exchange that
 might not be in the best interest.

Tr. 79-80. The VE responded that such a person could perform work as a

1 production assembler, hand packager, or laundry worker. Tr. 80.

2 The ALJ posed a second hypothetical question to the VE which included the
3 following limitations:

4 an individual who requires special supportive supervision, an
5 individual who would require a need to be shown even perhaps
6 simple, routine tasks over and over and someone who . . . could . . .
7 provide a good deal of empathy for, perhaps, variances in mood or . . .
8 situations that might lead to frustration.

9 Tr. 81. The VE responded that a person with such limitations would require a
10 “sheltered work environment.” Tr. 81.

11 At step five of the ALJ’s decision, the ALJ determined that, considering
12 Plaintiff’s age, education, work experience and RFC, and based on the testimony
13 of the VE, there were other jobs that exist in significant numbers in the national
14 economy Plaintiff could perform, including the jobs of production assembler, hand
15 packager, and laundry worker. Tr. 32-33.

16 The Court finds that the ALJ did not err at step five. As discussed *supra*, the
17 ALJ did not err in evaluating Plaintiff’s credibility or in weighing the medical
18 evidence. As evidenced by the ALJ’s decision, the limitations included in the
19 ALJ’s first hypothetical question to the VE were the only limitations the ALJ
20 found credible and supported by the evidence, which are the only limitations that
21 the ALJ is required to include in the ALJ’s inquires to the VE. *See Osenbrock v.*
22 *Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001).

23 Plaintiff argues that the ALJ should have included limitations assessed by
24 Plaintiff’s teachers in Plaintiff’s IEPs, including Plaintiff’s need for
25 accommodations, more time to complete tasks, the need to have instructions
26 repeated, and limitations caused by Plaintiff’s migraine headaches. ECF No. 15 at
27 14-15. Plaintiff argues that the ALJ should have credited these limitations as the
28 ALJ “cited [Plaintiff’s] IEPs with approval.” ECF No. 15 at 15.

1 The Court disagrees that the ALJ credited, or was required to credit, all the
2 limitations assessed in Plaintiff's IEPs. In analyzing the six childhood disability
3 domains, the ALJ discussed Plaintiff's IEPs at length. The ALJ discussed
4 statements contained in the IEPs that tended to support Plaintiff's disability claim,
5 as well as evidence that seemed to contradict such claim. The ALJ discounted
6 statements regarding Plaintiff's difficulties paying attention and following
7 instructions and his need for extra time. The ALJ gave these limitations little
8 weight, reasoning that Plaintiff's academic difficulties stemmed largely from his
9 poor attendance and inadequate effort. As discussed *supra*, the ALJ gave greater
10 weight to evidence indicating that Plaintiff did not have serious difficulties in the
11 six domains of functioning. *See, e.g.*, Tr. 26 (citing Tr. 291) (teachers'
12 observations that Plaintiff's attention was improving). Given the conflicting
13 evidence, and valid reasons provided by the ALJ to discount certain limitations, the
14 Court must defer to the ALJ's weighing of the statements contained in the IEPs.
15 *See Tackett*, 180 F.3d at 1097 (if the evidence is susceptible to more than one
16 rational interpretation, the court may not substitute its judgment for that of the
17 ALJ).

18 **E. Failure to develop the record**

19 Plaintiff argues that the ALJ failed to adequately develop the record by not
20 requesting physical and mental consultative evaluations of Plaintiff in regards to
21 his adult SSI application. ECF No. 15 at 16. Plaintiff argues that the ALJ's duty
22 to develop the record was heightened given the fact that Plaintiff did not have legal
23 representation. *Id.* Defendant argues that "there is no ambiguity in this record that
24 would have triggered the ALJ's duty to develop the record by obtaining a
25 consultative examination." ECF No. 16 at 13.

26 "In Social Security cases the ALJ has a special duty to fully and fairly
27 develop the record and to assure that the claimant's interests are considered."
28 *Smolen*, 80 F.3d at 1288. This duty is heightened when a claimant is unrepresented

1 during the administrative phase of his or her case. *See Widmark v. Barnhart*, 454
 2 F.3d 1063, 1068–69 (9th Cir. 2006) (where claimant is unrepresented “it is
 3 incumbent upon the ALJ to scrupulously and conscientiously probe into, inquire
 4 of, and explore all the relevant facts,” as well as remain “especially diligent in
 5 ensuring that favorable as well as unfavorable facts and circumstances are
 6 elicited”); *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (ALJ has
 7 duty “to fully and fairly develop the record and to assure that the claimant’s rights
 8 are considered,” and “must be especially diligent in exploring for all the relevant
 9 facts” when claimant is not represented).

10 Despite the ALJ’s duty to develop the record, it remains the claimant’s
 11 burden to prove that he or she is disabled. 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. §
 12 416.912(a). “An ALJ’s duty to develop the record . . . is triggered only when there
 13 is ambiguous evidence or when the record is inadequate to allow for proper
 14 evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir.
 15 2001); *see also Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005) (“The ALJ’s
 16 duty to supplement a claimant’s record is triggered by ambiguous evidence, the
 17 ALJ’s own finding that the record is inadequate[,] or the ALJ’s reliance on an
 18 expert’s conclusion that the evidence is ambiguous.”). An ALJ may fulfill his or
 19 her duty to develop the record by “continuing the hearing, or keeping the record
 20 open after the hearing to allow supplementation of the record.” *Smolen*, 80 F.3d at
 21 1288.

22 In this case, multiple doctors evaluated Plaintiff’s impairments. In
 23 September 2010, Plaintiff presented to CeCila Cooper, Ph.D., for a psychological
 24 evaluation. Tr. 303-11. In October 2010, Edward Beaty, Ph.D., and Charles
 25 Wolfe, M.D., completed a Childhood Disability Evaluation Form connected with
 26 Plaintiff’s initial SSI application. *See* Tr. 313-18. In March/April 2011, Beth
 27 Fitterer, Ph.D., and Debra Iannuzzi, M.D., completed a Childhood Disability
 28 Evaluation Form connected with Plaintiff’s SSI application at the reconsideration

1 level. *See* Tr. 343-48. At the April 2013 hearing, the ALJ elicited the opinions of
2 medical expert Larry Kravitz, Ph.D. *See* Tr. 49-55. After the hearing, the ALJ
3 further supplemented the record by obtaining medical records from Dr. Hernandez
4 and Dr. Tatumay. *See* Tr. 349-90, 391-95.

5 The Court finds that the ALJ did not err in declining to refer Plaintiff to
6 consultative examinations to determine Plaintiff's functional limitations under the
7 adult disability standards. The record before the ALJ was neither ambiguous nor
8 inadequate to allow for proper evaluation of the evidence. *Mayes*, 276 F.3d at 459-
9 60; *Webb*, 433 F.3d at 687. It is true that the State agency physicians, as well as
10 Dr. Kravitz, evaluated Plaintiff's impairments under the childhood disability
11 standards. But these standards are more stringent than the standards applied to
12 adult disability claims. And Plaintiff cites to no authority requiring the ALJ to
13 refer a claimant to consultative examinations simply because the claimant turned
14 eighteen after filing his SSI application. Plaintiff makes no claim that his
15 condition changed or worsened since he turned eighteen and does not contest the
16 ALJ's finding that Plaintiff had not developed any new impairments since attaining
17 age eighteen. *See* Tr. 30. In sum, Plaintiff failed to meet his burden to establish
18 that he was disabled after he became an adult. 42 U.S.C. § 423(d)(5)(A); 20 C.F.R.
19 § 416.912(a).

20 On a final note, the Court disagrees with Plaintiff's assertion that the ALJ
21 somehow erred in explaining to Plaintiff his right to representation. ECF No. 15 at
22 16 n.1 (citing Manual on Social Security Administration Hearings, Appeals and
23 Litigation Law (HALLEX) I-2-6-52). HALLEX I-2-6-52 does not mandate that
24 the ALJ provide a "required explanation" regarding a claimant's right to
25 representation. ECF No. 15 at 16 n.1. To the contrary, HALLEX I-2-6-52 states
26 that "[t]he ALJ is not required to recite specific questions regarding the right to
27 representation." HALLEX I-2-6-52 further suggests that, at the claimant's request,
28 the ALJ should typically postpone the hearing to allow the claimant to obtain

1 representation. In this case, the ALJ complied with HALLEX I-2-6-52 by
2 postponing Plaintiff's hearing to give Plaintiff and his mother the chance to obtain
3 representation. Tr. 13, 40-41. Plaintiff was further advised of his right to
4 representation in the hearing acknowledgement letter, Tr. 104-11, as well as in the
5 notice of hearing, Tr. 112-19. The Court finds no error in the steps taken to inform
6 Plaintiff of his right to representation.

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's findings, the Court finds the
9 ALJ's decision is supported by substantial evidence and free of harmful legal error.
10 Accordingly, **IT IS ORDERED:**

11 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is

12 **GRANTED.**

13 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

14 The District Court Executive is directed to file this Order and provide a copy
15 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
16 and the file shall be **CLOSED**.

17 DATED October 15, 2015.



18 A handwritten signature in black ink, appearing to read "M", is placed over a horizontal line.

19
20 JOHN T. RODGERS
21
22 UNITED STATES MAGISTRATE JUDGE
23
24
25
26
27
28